UNITED STATES GOVERNMENT
BEFORE THE NATIONAL LABOR RELATIONS BOARD
REGION 16

Austin, Texas

RAINTREE CONSTRUCTION, INC.[1]
Employer

and Case No. 16-RC-10657

SHEET METAL WORKERS INTERNATIONAL ASSOCIATION LOCAL 67[2]
Petitioner

DECISION AND DIRECTION OF ELECTION

The Employer, Raintree Construction, Inc., is a general construction contractor headquartered in Austin, Texas. The Petitioner, Sheet Metal Workers International Association Local 67, filed a petition with the National Labor Relations Board under Section 9(c) of the National Labor Relations Act seeking to represent a unit of approximately 26 employees consisting of all full-time sheet metal mechanics, AC installers, AC technicians, AC mechanics, service technicians, apprentices and helpers employed by the Employer in Bastrop, Blanco, Burnet, Caldwell, Hays, Llano, Travis and Williamson counties. The Petitioner seeks to exclude all other employees, including clerical and supervisors as defined in the Act.[3] A hearing officer of the Board held a hearing and the parties filed briefs with me.

As evidenced at the hearing, the parties agree that any unit found appropriate should include sheet metal mechanics and helpers[4] within the petitioned-for counties. However, the

[1] The Employer's name appears as amended at the hearing. (Board Exhibit 2)
[2] The Petitioner's name appears as amended at the hearing. (Board Exhibit 2)
[3] The Petitioner's proposed unit appears as amended at the hearing.
[4] The classification of helper is used interchangeably with laborer.

parties disagree on: (1) whether the petitioned-for unit is contracting such that it would serve no useful purpose to direct an election at this time; (2) whether seven probationary employees (Earl Denson, Eddie Gaona, Emilio Villareal, Michael Kirk, Michael Goff, Scott Castleberry and Sonny Zundt) should be included in any unit found appropriate; and (3) whether an HVAC technician (Jerry Trahan) should be included in any unit found appropriate.

The Employer initially argues that the petition should be dismissed because the petitioned-for unit will significantly contract in the near future and, thus, it would serve no useful purpose to determine a question concerning representation at this time. The Employer alleges that it only has two jobs within the geographical scope of the sought-after unit, and both jobs are scheduled to be completed within 30 days. Thereafter, it intends to change the focus of its operations away from sheet metal-type work. The Petitioner, on the other hand, argues that the petitioned-for unit is not contracting and that the Employer has at least two other pending jobs involving sheet metal work within the geographical scope of the petitioned-for unit. The Petitioner contends that any alleged change in operations by the Employer is speculative, at best.

Next, if an appropriate unit is determined, the Employer argues that the seven listed employees should be excluded because they are probationary employees with performance issues and, thus, have no reasonable expectation of continued employment. The Petitioner maintains the Employer's position is inconsistent because it only seeks to exclude seven of its approximately 16 probationary employees. [5] Further, because the Employer conducts business in the construction industry, the Union argues that the Board's voter eligibility formula as set forth in ***Steiny & Co.,*** 308 NLRB 1323 (1992) applies.

[5] I take administrative note that the contested seven probationary employees are subjects of an unfair labor practice charge.

Finally, the Employer contends that the Petitioner's proposed unit is inappropriate because the HVAC technician (Jerry Trahan) does not share a community of interest with other petitioned-for employees. On the contrary, the Petitioner argues that the HVAC technician should be included in any unit found appropriate herein.

Having considered the record evidence and the parties' arguments, I conclude that the evidence is insufficient to establish that the sought-after unit is contracting or that the Employer is undergoing a fundamental change in operations such that it would serve no useful purpose to direct an election at this time. Therefore, I find an immediate election should be directed. I further find a community of interest among the sheet metal workers, and specifically find an appropriate unit consisting of all sheet metal mechanics, laborers and helpers employed by the Employer in Bastrop, Blanco, Burnet, Caldwell, Hays, Llano, Travis and Williamson counties, subject to the eligibility requirements set forth in ***Daniel Construction Co.***, 133 NLRB 264 (1961) as modified at 167 NLRB 1078 (1967), and ***Steiny & Co.***, 308 NLRB 1323, 1324 (1992).[6] Regarding the seven above-named probationary employees, I find they, like the remaining probationary employees, fall within the classification of sheet metal mechanic, laborers and helpers, and are eligible to vote subject to the ***Steiny/Daniel*** criteria. I have concluded to exclude the HVAC technician based on a lack of community of interest with the other employees in the unit found appropriate herein. The factual basis and analysis for these findings follow below.

[6] The petitioned-for unit includes all AC installers, AC technicians, AC mechanics. It appears from the limited evidence in the record that in the sheet metal construction industry, AC installers, AC technicians, and AC mechanics are also known as HVAC technicians. Because the record shows the Employer does not employ any workers in the job classifications of AC installer, AC technician, and AC mechanic, I am excluding them from the unit.

STATEMENT OF FACTS

The Employer is a Texas corporation engaged in the general construction business. The Employer's main shop or office is located at 9600 Brown Lane, Austin, Texas. Corbin McMillion is the president and has been such since the inception of the company around 7 years ago.[7] McMillion's wife is also employed with the company and handles the company books.

At the time of the hearing, the Employer employed one HVAC technician (Jerry Trahan), and approximately 25 sheet metal workers consisting of mechanics, laborers and helpers. The majority of the sheet metal workers work at either of the Employer's ongoing projects. Three of these craft employees (Don Lilly, Al Machado, and Omar Acuna) work at the shop and are generally responsible for fabricating duct, assemblies, and metal. Other than clerical and supervisors, the Employer categorizes all of its employees as sheet metal mechanics, helpers, and HVAC technicians. The Employer employs two supervisors (Jason Durham and John Fontenot),[8] who supervise the sheet metal employees. Although all employees are "at-will," subject to termination without cause at any time, the Employer further classifies employees as either permanent or probationary.[9] According to the Employer, it utilizes a 90-day probationary period in order to evaluate the performance of its employees to determine if they fit the position they were hired for, and if not, it replaces them. Upon completion of the initial introductory

[7] The parties stipulated, and I find, that Corbin McMillion is a supervisor within the meaning of Section 2(11) of the Act and as such, possesses and exercises one or more of the following authorities: hire, transfer, suspend, lay off, recall, promote, discharge, assign, reward or discipline other employees or responsibly to rate them or to adjust their grievances or effectively to recommend such action, utilizing independent judgment in exercising such authority; and, therefore, he should be excluded from the bargaining unit.

[8] The parties stipulated, and I find, that Jason Durham and John Fontenot are supervisors within the meaning of Section 2(11) of the Act and as such, possess and exercise one or more of the following authorities: hire, transfer, suspend, lay off, recall, promote, discharge, assign, reward or discipline other employees or responsibly to rate them or to adjust their grievances or effectively to recommend such action, utilizing independent judgment in exercising such authority; and, therefore, should be excluded from the bargaining unit.

[9] The Employer's Company Policy and Procedure Manual lists these categories as "regular full-time" and "introductory."

period, employees enter the "regular" or permanent employment classification. However, the introductory employment period may be extended at the Employer's discretion.

The pay begins at $8.50 or $9 per hour for helpers to $29 per hour for journeyman. The Employer provides vacation benefits for certain employees, but the record is unclear exactly when and which employees are eligible.

At the time of the hearing, the Employer had three ongoing projects that involved sheet metal work: Capital Metro in Travis County (Austin), Wal-Mart in Travis County (Austin) and Long John Silver's in Bexar County (San Antonio).[10] In the past two or three years, the Employer has secured and performed other sheet metal work on projects for Wal-Mart, HEB, Albertson's and Randall's.

The Capital Metro project is scheduled for completion by May 4, 2005. The Employer employed as many as 13 employees on the Capital Metro job, but after a phase-down, it currently employs approximately 10 or 11. The Employer anticipates a further phase-down of two or three employees in the next couple weeks. After the Capital Metro project is complete, the Employer anticipates laying off all employees assigned to the project. John Fontenot is the supervisor and will be retained after the job is over.

At the time of the hearing, the Wal-Mart project was scheduled for completion by April 7, 2005. The Employer presently employs approximately nine employees on this job. Jason Durham is the supervisor. It is unclear whether Durham will be retained after the job is over.

The Employer has two additional ongoing projects (the Sandhill Energy Project and Lakeway project) that do not involve sheet metal work. The Sandhill Energy project is a replacement and rework on a solar absorption system with solar collectors and lithium monitor.

[10] Bexar County falls outside of the geographical scope of the petitioned-for unit.

The Lakeway project is a design project on a mechanical system. These projects are manned by HVAC technicians and pipefitters.[11]

The Employer has two pending bids for additional sheet metal work in Travis County—the Travis Association for the Blind and Lowe's. At the time of the hearing, the jobs had not been awarded. If awarded, the Employer estimates that the Travis Association for the Blind project would commence first and the Lowe's job would begin afterwards—i.e. the jobs would run consecutively not concurrently. If awarded, the Employer intends to employ five employees to man each job and anticipates using the same employees it currently employs on the Wal-Mart site because these employees are accustomed to doing this type of work and are familiar with other Lowe's or similar projects. The Employer does not anticipate using any of the current employees employed on the Capital Metro project.

Notwithstanding these pending bids, the Employer contends that it intends to change the direction of the company and will focus on maintenance and service operations versus the straight construction-type sheet metal work it has been doing. In furtherance of its intended change, the Employer alleges that it has stopped actively pursuing "larger" sheet metal type work and has discussed subcontracting any future sheet metal work to a current employee. The record evidence reveals that the Employer does not currently employ an HVAC service technician supervisor or any employee certified as an EPA refrigerant service technician. Notably, as late as January 2005, the Employer employed Chuck Klima to supervise HVAC service technicians, but soon thereafter laid him off. Similarly, the Employer previously employed several HVAC service technicians, including John Cadina, Wayne Matheson and Vincent Reyes, but all are no

[11] The record reflects these employees are subcontractors of the Employer. Neither party contends that these individuals should be included in any unit found appropriate herein.

longer employed. At the time of the hearing, the Employer employed only one employee classified as an HVAC technician (Jerry Trahan).

ANALYSIS

Issue 1: Is the petitioned-for unit contracting substantially such that it would serve no useful purpose to direct an election at this time?

The Board has long recognized that the construction industry is different from many other industries in the way it hires and lays off employees. ***Steiny & Co***., 308 NLRB 1323, 1324 (1992). Employers in the construction industry experience fluctuations in the nature and duration of construction projects. Because of the fluctuations, construction workers experience intermittent employment, may be employed for short periods of time, and may work for several different employers during the course of a year. *Id.* To compensate for such fluctuations without disenfranchising construction industry employees, the Board has developed a formula to determine voter eligibility. The Board applies this formula in all construction industry cases except where the employer clearly operates on a seasonal basis or the parties have agreed otherwise. ***Steiny & Co.,*** 308 NLRB at 1327-1328, fn. 16. *See also,* ***Signet Testing Laboratories, Inc***., 330 NLRB 1 (1999). Hence, by applying ***Steiny/Daniel***, the Board is able to proceed to elections in spite of fluctuations in the construction industry.

In this instance, it is undisputed that the Employer conducts business in the construction industry. Nevertheless, the Employer argues that an election in this matter would serve no useful purpose because the petitioned for-unit is contracting significantly in the near future and it is changing the focus of its operations. In its brief, the Employer cites ***Plum Creek Lumber Company, Inc.,*** 214 NLRB 619 (1974) and ***Douglas Motors Corp.,*** 128 NLRB 309 (1960) as examples where the Board has dismissed petitions where the unit sought was contracting and the

nature of the work of the remaining employees would change or a fundamental change in operations would occur.

Specifically, in ***Plum Creek Lumber Company, Inc.,*** the petitioned-for unit was contracting from 17 to 3 employees within approximately 4 months. Also, the nature of the remaining employees' work was going to change. The Board dismissed the petition. Similarly, in ***Douglas Motors Corp.,*** the Board dismissed the petition. There, the Employer was slated to eliminate 75 percent of its workforce and implement fundamental operational changes within approximately three months.

Upon review, I find both ***Plum Creek Lumber Company, Inc.*** and ***Douglas Motors Corp.*** distinguishable from the instant matter. Initially, I note that neither case involves a construction industry petition. Significantly, both pre-date the Board's ***Steiny/Daniels*** line of cases. Further, both cases involved situations where the employers were undergoing fundamental changes in operations and the Employer had made significant changes. For example in ***Douglas Motors Corp.,*** the Board found that the Employer was in the process of effectuating a program to eliminate all its production operations and had already executed certain subcontracts, expected signed contracts for wrecking crane and plow-production, had received bids on trailers, and was negotiating other contracts. In contrast, the instant record lacks evidence to show an actual program changing the Employer's business has occurred. For example, the record shows the Employer has had some discussion about contracting out its future sheet metal work and was also no longer actively pursuing "larger" sheet metal work. Moreover, the record shows at the present time the Employer employs only one HVAC technician, who is in training, and laid off its service technician supervisor around January 2005, in addition to

other HVAC service technicians. Thus, the evidence belies the Employer's contention that it is moving from sheet metal work to service-based technician work.

The Employer further relies upon ***Davey McKee Corporation,*** 308 NLRB 839 (1992) and ***M.B. Kahn Construction Co.,*** 210 NLRB 1050 (1974) in support of its contracting-unit argument. In ***Davey McKee,*** the Board dismissed the petition where the record reflected that the employer was imminently ceasing all work, therefore, would dissolve the sought-after unit. The Board found that because all of the employer's current jobs were soon ending and the evidence of pending job bids was uncertain, imminent cessation of its operations was clear. The Board held that where an employer's operations are scheduled to terminate within three to four months that no useful purpose is served by directing a petition.

Similarly, in ***M.B. Kahn,*** the Board dismissed a petition because of the imminent completion of the construction project. The evidence reflected that the employer's project commenced around April 1, 1973 and would clearly end between June and July 1974, at which time all employees would be terminated. Additionally, the record showed the first major phase of the work would be completed by March 14, 1974. Because the evidence showed the project dates would be met, the Board found the overall project was on schedule for completion. Moreover, it appeared that the employees were recruited from a geographic area where the employer had no other work and did not contemplate any in the future. Thus, the employees had no opportunity for further employment with the Employer. The Board concluded that it would serve no useful purpose to conduct an election.

The instant case is distinguishable from the above-cited cases because the record shows no clear indication that the Employer's operations are fundamentally changing. The Employer has only engaged in conversations about proposed changes, and has not increased or shown steps

to increase its HVAC service-technicians. Moreover, the evidence shows no imminent cessation of the Employer's sheet metal jobs. The record reveals two pending sheet metal job bids. Further, the Employer is retaining at least one of its sheet metal supervisors, Fontenot.

I find the facts of the instant case more akin to those in ***Fish Engineering & Construction,*** 308 NLRB 836 (1992) where the Board distinguished ***Davey McKee*** and found that an immediate election was warranted. In ***Fish Engineering & Construction,*** the record established that the employer had completed four projects in the past year, two of which were ongoing at the time of hearing, and had a pending bid for future work in the same geographic area as the sought unit. Based on the evidence of the Employer's past and current work, and its bidding on future work within the unit sought by the petitioner, the Board found that it would serve a useful purpose to conduct an immediate election after resolving the remaining unit issues.

Similarly, at the time of the hearing, the Employer had two sheet metal projects (Capital Metro and Wal-Mart) within the geographical scope of the petitioned-for unit. Further, the Employer has two pending job bids (Lowe's and Travis Association for the Blind) and is seeking to secure additional sheet metal work within the geographical scope of the sought after unit. The record reflects that, if awarded, the Employer intends to staff the job with approximately five sheet metal workers for each job. The record shows the Employer intends to select these five employees from the current employees on the Wal-Mart job. The jobs are scheduled to run consecutively.

Because the evidence shows that the Employer's sheet metal work is continuing, I conclude that an immediate election is warranted.

Issue 2: Does a community of interest exist among the sheet metal employees, including mechanics, laborers, and helpers

The Board's procedure for determining an appropriate unit is to examine the petitioned-for unit, and, if that unit is appropriate, end the inquiry into unit appropriateness. ***Bartlett Collins Co.***, 334 NLRB 484 (2001). For a unit to be appropriate, the key question is whether the employees in that unit share a sufficiently strong community of interest. The Board first announced the community of interest concept in ***Kalamazoo Paper Box Corporation***, 136 NLRB 134 (1962). "In determining whether the employees in the unit sought possess a separate community of interest, the Board examines such factors as mutuality of interest in wages, hours, and other working conditions; commonality of supervision; degree of skill and common functions; frequency of contact and interchange with other employees; and functional integration." ***The Boeing Company***, 337 NLRB No. 24 (2001) (citations omitted).

I find that the sheet metal workers, including mechanics, laborers, and helpers, share a sufficient community of interest to constitute an appropriate unit.

The record reflects that sheet metal employees are subject to the same general working conditions. For example, sheet metal workers use the same tools to perform their work, a hammer, pair of snips, and a screwdriver. The sheet metal workers install sheet metal and duct at the Employer's construction sites. They do not wire machines up and are not required to have EPA certification. The sheet metal helpers are only assigned to help the mechanics and laborers. Sheet metal workers, including mechanics, laborers, and helpers, work as a group. On prevailing wage jobs, sheet metal workers are paid a set rate specific to the sheet metal industry, although the record does not indicate the exact amount. The record does reveal that helpers begin at $8.50 or $9 an hour up to $29 an hour for journeymen. The record shows no evidence of transfer from

HVAC technician to sheet metal worker or vica versa. The one instance of transfer occurred when HVAC technician Trahan first started working for the Employer as a sheet metal worker. However, he only worked in sheet metal for about two weeks. The record shows no other evidence of transfer or interchange among the petitioned-for group of employees.

Based on the record evidence, I find that the sheet metal workers, including mechanics, laborers, and helpers, share a community of interest and constitute an appropriate unit for the purposes of collective bargaining.

Issue 3: Should seven probationary employees (Earl Denson, Eddie Gaona, Emilio Villareal, Michael Kirk, Michael Goff, Scott Castleberry and Sonny Zundt) be included in the unit found appropriate?

The Employer argues that the seven listed employees should be excluded from the unit because they are probationary, have performance issues and thus, no reasonable expectation of continued employment. The Petitioner disagrees and argues that the Employer seeks only to exclude a portion of its probationary employees. Further, because the Employer conducts business in the construction industry, the Petitioner argues that Board's voter eligibility formula as set forth in ***Steiny & Co.,*** 308 NLRB 1323 (1992) is dispositive of this issue.

Probationary employees . . . receive and hold their employment with a contemplation of permanent tenure, subject only to the satisfactory completion of an initial trial period." ***National Torch Tip Co.,*** 107 NLRB 1271, 1273 (1954); ***Vogue Art Ware & China Co***., 129 NLRB 1253 (1961); ***Johnson Auto Spring Service***, 221 NLRB 809 (1975). Where their general conditions of work and their employment interests are like those of the regular employees (***Rust Engineering Co.,*** 195 NLRB 815 (1972)) and they have a reasonable expectation of continued employment (***Afro Jobbing & Mfg. Corp***., 186 NLRB 19 (1970)), probationary employees are

included in the unit. The requirement of the completion of a probationary period does not militate against a finding that the employees are permanent. ***Pacific Tile & Porcelain Co***., 137 NLRB 1358 (1962); ***Sheffield Corp.,*** 123 NLRB 1454 (1959).

The record shows the following 16 employees are all probationary: Earl Denson, Eddie Gaona, Emilio Villareal, Ezequil Paz, Filiberto Velazques, Jason Durham (supervisor), Jerry Trahan (HVAC technician), Luis Acuna, Michael Kirk, Michael Goff, Omar Acuna, Otoman Fernandez, Rey Acuna, Scott Castleberry, Selvin Garcia and Sonny Zundt. The following employees are all permanent employees: Antonio Mata, Carlos Lopez, Don Lilly, Erick Gordillo, John Fontenot (supervisor), Jose C. Mata, Jose R. Mata, Josue Salinas, Juan Ortiz, Miguel Mata, Nicolas Buadisda, Ramiro Mata and Ramiro Rios.

In spite of the Employer's argument that probationary employees should be excluded because they lack a reasonable expectation of employment, both at the hearing and on brief, the Employer seeks to exclude only seven of the 16 probationary employees. The flaw in the Employer's argument is quite evident and it appears that the Employer seeks to exclude only certain similarly classified employees but not others.[12]

Without addressing this inconsistency, on brief, the Employer seems to articulate a new argument, not made on the record, that not only are the contested employees probationary, they are also temporary. The Employer relies upon ***Pen Mar Packaging Corp.,*** 261 NLRB 874 (1971). In ***Pen Mar Packaging***, the Board ruled the contested temporary employee was ineligible for inclusion in the unit because the employee was informed he was only being hired for the summer and the prospect of termination at summer's end was sufficiently finite to dispel reasonable contemplation of continued employment after that season. ***Id.***

[12] Notably, the seven contested employees are all subjects of unfair labor practice charges.

I note the Employer's reliance on ***Pen Mar Packaging Corp.*** appears to be a change from its position at the hearing where it argued that the employees in question were simply "probationary without a reasonable expectation of continued employment." At the hearing, the Employer never raised the issue of the probationary employees being "temporary."

Assuming the contested group of employees was temporary, the Employer's argument that they should be excluded is not supported by the record. No evidence establishes that any of the contested probationary employees, at the time of hire, were notified that their employment was temporary or would end on a date certain. On the contrary, the record shows when at least one probationary employee was hired, the Employer alerted him that it had other pending job bids.

Further, in its brief, the Employer raises unfair labor practice issues. The Board will not permit the litigation of unfair labor practices in representation proceedings. ***Times Square Stores Corp.***, 79 NLRB 361 (1948). See also ***Texas Meat Packers***, 130 NLRB 279 (1961), ***Cooper Supply Co.,*** 120 NLRB 1023 (1958), and ***Capitol Records***, 118 NLRB 598 (1957). Therefore, I am declining to address the Employer's argument that the seven contested employees do not share a community of interest with the proposed unit because of alleged union activity.

Based on the preponderance of the evidence, I conclude that the seven contested probationary employees (Earl Denson, Eddie Gaona, Emilio Villareal, Michael Kirk, Michael Goff, Scott Castleberry and Sonny Zundt) are employees that fall under the classification of sheet metal mechanic, helper and laborer. Much like the remaining sheet metal workers, they should be included in the unit and permitted to vote, provided they meet the ***Steiny/Daniel*** criteria.

Issue 4: Should the HVAC technician (Jerry Trahan) be included in the unit found appropriate?

The Employer contends that the HVAC technician (Jerry Trahan) should be excluded from the unit because he does not share a community of interest with other petitioned-for employees. The Petitioner disagrees and seeks to include the HVAC technician in the unit found appropriate.[13]

Resolution of unit composition issues begins with an examination of the petitioned-for unit. If it is appropriate, the inquiry ends. ***Bartlett Collins Co.,*** 334 NLRB 484 (2001). In determining the threshold issue of appropriateness, the Board is guided by the principle that it need endorse only an, not the most, appropriate unit. ***Morand Bros. Beverage Co.,*** 91 NLRB 409, 419 (1950). Appropriateness normally depends upon community of interest factors including but not limited to mutuality of wages, hours and working conditions; commonality of supervision; similarity in skills and functions; frequency of contact and interchange; and functional integration. ***Ore-Ida Foods,*** 313 NLRB 1016 (1994). A Union's desire is relevant, but not dispositive. ***E.H. Koester Bakery & Co.,*** 136 NLRB 1006 (1962). If the petitioned-for unit is not appropriate, the Board may examine alternative units suggested by the parties, but it also has the discretion to select an appropriate unit that is different from the alternative proposals of the parties. ***Overnite Transportation Co.,*** 331 NLRB 662 (2000); ***Bartlett Collins Co.,*** *supra.*

Upon review of the record, I conclude that the HVAC technician (Jerry Trahan) does not share such a substantial community of interest with the sheet metal employees as to mandate his inclusion in the unit. The record revealed that Trahan, although initially employed as a sheet metal installer on the Capital Metro job, only worked in sheet metal for two weeks. Since then,

[13] At the hearing, the Petitioner expressed a desire to represent any unit found appropriate herein.

he has been working as an HVAC service technician. Although Trahan is not certified as an HVAC service technician, he is presently undergoing HVAC training both on-the-job, directly from McMillion, and through a course at Capital City Trade and Technical School. The record contains no evidence that any other employee is undergoing similar training.

The record shows that Trahan does not currently do any sheet metal work and has not done any for the past two months. He primarily works by himself and has no interaction with the sheet metal workers. Further, the tools and job of an HVAC service technician are completely different than the tools and job of a sheet metal worker. As an HVAC service technician, Trahan uses tools such as meters, multimeters, VRMs, digital multimeters, gauges, manifold gauges and different types of wrenches. For example, he uses a digital multimeter to take readings of voltage current and resistance in order to service equipment. He uses manifold gauges to take pressure readings and find out whether the equipment needs to be charged with refrigerants. He no longer uses or even carries sheet metal tools—hammer, a pair of snips, and a screwdriver.

As an HVAC technician, Trahan primarily works on service calls and works directly for McMillion who is his immediate supervisor. During Trahan's short time as a sheet metal worker, John Fontenot was his supervisor. Trahan now gets his assignment directly from McMillion—either the evening before or through two-way radio communication. In addition to the two-way radio, the Employer provides Trahan with a service van so that he can work the HVAC service jobs. Trahan did not have a two-way radio or a van as a sheet metal installer.

The Employer hired Trahan at the rate of pay of $15 per hour which remains unchanged. Both as an HVAC technician and as a sheet metal installer, Trahan worked an average of 40 hours per week. He is paid bi-monthly on Mondays. As an HVAC technician, similar to the sheet metal workers, Trahan does not receive any other benefits as far as sick leave, vacation

time, or health or dental benefits. Both as a sheet metal worker and an HVAC technician, Trahan receives thirty minutes for lunch. However, during his time as a sheet metal installer, the job supervisor determined when Trahan could take lunch breaks. Now, as an HVAC technician, Trahan himself determines when to take his lunch.

Upon review of the community of interest factors, I conclude that the difference in supervision, difference in working conditions, lack of interchange or even contact with sheet metal workers, difference in skill-set and difference in function or duties weigh against the inclusion of the HVAC technician in the unit found appropriate herein. Therefore, I will exclude the HVAC technician from the unit set forth below.

In summary, I find that an immediate election is warranted and that voters' eligibility will be determined according to the ***Steiny/Daniel*** formula. *See* ***Steiny & Co***., 308 NLRB at 1324. Additionally, because all the sheet metal workers share similar working conditions, work as a group, share the same supervision, have the same pay rates, use the same tools, and do not interchange or transfer into any other job classification, I find a community of interest exists among them. Therefore, I find the sheet metal workers, including mechanics, laborers, and helpers, constitute an appropriate unit, and that probationary employees within those classifications should be included, as well. I am not including the HVAC technician in the unit for the reasons set forth above

CONCLUSIONS AND FINDINGS

Based upon the entire record in this matter and in accordance with the discussion above, I conclude and find as follows:

1. The hearing officer's rulings made at the hearing are free from prejudicial error and are affirmed.

2. The parties stipulated, and I find, that the Employer, Raintree Construction, Inc., a Texas Corporation with an office and place of business in Austin, Texas, is engaged in the general construction business. During the twelve months preceding the filing of the petition, a representative period, the Employer in conducting its business operations purchased and received at its Austin, Texas facility goods valued in excess of $50,000 from other enterprises located within the State of Texas, each of which other enterprises had received those goods directly from points outside the State of Texas.

3. The Petitioner claims to represent certain employees of the Employer.

4. The parties stipulated to the Petitioner's labor organization status.

5. A question affecting commerce exists concerning the representation of certain employees of the Employer within the meaning of Section 9(c)(1) and Section 2(6*)* and (7) of the Act.

6. The following employees of the Employer constitute an appropriate unit for the purpose of collective bargaining within the meaning of Section 9(b) of the Act:

> **Included:** All full-time and probationary sheet metal workers including mechanics, laborers and helpers employed by the Employer in Bastrop, Blanco, Burnet, Caldwell, Hays, Llano, Travis and Williamson counties.
>
> **Excluded:** All other employees including, the HVAC technician, clerical and supervisors as defined in the Act.

DIRECTION OF ELECTION

The National Labor Relations Board will conduct a secret ballot election among the employees in the unit found appropriate above. The employees will vote whether or not they wish to be represented for purposes of collective bargaining by the Sheet Metal Workers International Association Local Local 67.

The date, time, and place of the election will be specified in the notice of election that the

Board's Regional Office will issue subsequent to this Decision.

Voting Eligibility

Eligible to vote in the election are 1) persons in the unit who were employed during the payroll period ending immediately before the date of this Decision, including employees who did not work during that period because they were ill, on vacation, or temporarily laid off; 2) persons in the bargaining unit who were employed by the Employer for 30 days or more within the 12 months preceding the eligibility date of the election (i.e., the last day of the payroll period immediately preceding the date of this Decision); and 3) persons in the bargaining unit who were employed by the Employer for at least some time in the 12 months preceding the eligibility date of the election, and for 45 days or more within the 24 months preceding the eligibility date of the election.

Employees engaged in any economic strike, who have retained their status as strikers and who have not been permanently replaced are also eligible to vote. In addition, in an economic strike which commenced less than 12 months before the election date, employees engaged in such strike who have retained their status as strikers but who have been permanently replaced, as well as their replacements are eligible to vote. Unit employees in the military services of the United States may vote if they appear in person at the polls.

Ineligible to vote are (1) employees who have quit or been discharged for cause since the designated payroll period; (2) striking employees who have been discharged for cause since the strike began and who have not been rehired or reinstated before the election date; and (3) employees who are engaged in an economic strike that began more than 12 months before the election.

Employer to Submit List of Eligible Voters

To ensure that all eligible voters may have the opportunity to be informed of the issues in the exercise of their statutory right to vote, all parties to the election should have access to a list of voters and their addresses, which may be used to communicate with them. ***Excelsior Underwear, Inc.***, 156 NLRB 1236 (1966); ***NLRB v. Wyman-Gordon Company***, 394 U.S. 759 (1969).

Accordingly, it is hereby directed that within 7 days of the date of this Decision, the Employer must submit to the Regional Office an election eligibility list, containing the full names and addresses of all the eligible voters. ***North Macon Health Care Facility***, 315 NLRB 359, 361 (1994). This list must be of sufficiently large type to be clearly legible. To speed both preliminary checking and the voting process, the names on the list should be alphabetized (overall or by department, etc.). Upon receipt of the list, I will make it available to all parties to the election.

To be timely filed, the list must be received in the San Antonio Resident Office, Travis Park Plaza Building, 711 Navarro Street, San Antonio, Texas 78205 on or before April 22, 2005. No extension of time to file this list will be granted except in extraordinary circumstances, nor will the filing of a request for review affect the requirement to file this list. Failure to comply with this requirement will be grounds for setting aside the election whenever proper objections are filed. The list may be submitted by facsimile transmission at 817-978-2928. Since the list will be made available to all parties to the election, please furnish a total of **two** copies, unless the list is submitted by facsimile, in which case no copies need be submitted. If you have any questions, please contact the Regional Office.

Notice of Posting Obligations

According to Section 103.20 of the Board's Rules and Regulations, the Employer must post the Notices to Election provided by the Board in areas conspicuous to potential voters for a minimum of 3 working days prior to the date of the election. Failure to follow the posting requirement may result in additional litigation if proper objections to the election are filed. Section 103.20(c) requires an employer to notify the Board at least 5 full working days prior to 12:01 a.m. of the day of the election if it has not received copies of the election notice. ***Club Demonstration Services***, 317 NLRB 349 (1995). Failure to do so estops employers from filing objections based on nonposting of the election notice.

RIGHT TO REQUEST REVIEW

Under the provisions of Section 102.67 of the Board's Rules and Regulations, a request for review of this Decision may be filed with the National Labor Relations Board, addressed to the Executive Secretary, 1099 14th Street, N.W., Washington, D.C. 20570-0001. This request must be received by the Board in Washington by 5:00 p.m., EST **on April 29 2005**. The request may **not** be filed by facsimile.

Dated: April 15, 2005

/s/ Curtis A. Wells

Curtis A. Wells, Regional Director,
National Labor Relations Board
Region 16
819 Taylor Street - Room 8A24
Fort Worth, TX 76102